the remedy by trespass or trover already alluded to, the officer surrendering the property is liable to the creditor: *Keating* v. *Spink*, 3 Ohio St. 105; and the officer receiving or seizing the property may himself release the levy and return the property: *Weber* v. *Henry*, 16 Mich. 460; and the court issuing the second process has power to compel a restoration of the property to the officer who surrendered it, or from whom it was taken, and it should exercise this power by ordering a return: *Booth* v. *Ableman*, 16 Wis. 460. Or the court from whose possession the property was taken, may enforce its return by attachment for contempt or other summary process: *Slocum* v. *Mayberry*, 2 Wheat. 2.

M. D. E.

Supreme Court of Iowa.

McCLEARY *v.* ELLIS.

A conveyance in fee-simple cannot contain a valid condition in restraint of alienation.

If the grantor parts with the fee it makes no difference that the conveyance is to one grantee for life and another in remainder. A condition in restraint of alienation, either voluntary or involuntary, of the life-estate, is void.

Land conveyed to A. for life, with remainder over to his children, with a condition that A.'s interest shall not be sold either by him or his creditors, is nevertheless liable to execution by A.'s creditors.

Nichols v. *Eaton*, 91 U. S. 716, distinguished.

ACTION by plaintiff, against one of the defendants, as sheriff, who had sold, under execution against plaintiff, plaintiff's interest in certain land conveyed to him by his father, to restrain such defendant from executing to the purchaser at the sale, another defendant, a sheriff's deed. Plaintiff claimed in his petition that by a condition in his father's deed to him, the land could not be alienated and was not liable to be sold for his debts. To the petition defendants demurred, but the purchaser offered to release from the operation of the sale the homestead to which plaintiff was entitled by law. The court below sustained the demurrer, from which plaintiff appealed.

The deed to plaintiff contained the following *habendum* clause: "To have the above-described lands his lifetime and to go to his children at his death; but if he dies without children, then the above-described land to go to his brother, George McCleary, and at his death to go to his brother's children, that is, George McCleary's children; but if George dies without children, it is to go to his sister's children. It is expressly understood that he shall

not part with it, nor sell it, nor shall any person sell it for him, or for any debts whatsoever."

Hoffman, Pickler & Brown, for appellant.

Tatlock & Wilson, for appellee.

The opinion of the court was delivered by

DAY, J.—From an examination of the deed of Alvam McCleary, it is evident that it conveyed a fee-simple estate. The conveyance is of a life-estate to John McCleary, the remainder to his children; but if he should die without children, to his brother George and his children, and if George should die without children, the remainder to his sister's children. The conveyance is of a life-estate and a vested remainder in fee: 4 Kent's Com. 203. No reversionary interest is retained in the grantor. He has disposed of his entire estate in fee. The disposition of the estate is to the beneficiary direct, without the intervention of trustees.

The question in this case is, can the grantor of the fee impose restraints upon alienation? Littleton, in sect. 360, states the doctrine upon this subject as follows: "If a feoffment be made upon the condition that the feoffee shall not alien the land to any one, this condition is void; because when a man is enfeoffed of lands or tenements, he hath power to alien them to any person by the law. For if such condition should be good, then the condition should oust him of all the power which the law gives him, which should be against reason, and therefore such a condition is void." Commenting upon this Lord COKE says: "And the like law is of a devise in fee, upon condition that the devisee shall not alien, the condition is void; and so it is of a grant, release, confirmation, or any other conveyance whereby a fee-simple doth pass. For it is absurd and repugnant to reason that he that hath no possibility to have the land revert to him should restrain his feoffee in fee-simple of all power to alien. And so it is if a man be possessed of a lease for years, or of a horse, or any other chattel, real or personal, and give or sell his whole interest and property therein upon condition that the donee or vendee shall not alien the same, the same is void; because his whole interest and property is out of him, so as he hath no possibility of a reverter, and it is against trade and traffic, and bargaining and contracting between man and man; and it is within the reason of our author that it should ouster him of all power given to him." Coke Litt. 223 *a*.

The case of *Mandlebaum* v. *McDonell*, 29 Mich. 78, contains a very elaborate and exhaustive consideration of this question. In that case a devise for life was made to the widow of the testator, remainder in fee to his sons and grandson, with a restriction upon alienation during the life of the widow, if she remained unmarried, and until the grandson, who was then four years old, should attain the age of twenty-five. The restriction upon the right of alienation was held void. In announcing the opinion of the court, CHRISTIANCY, J., employs this language: "If there is any English decision since the statute *quia emptores*, where the point was involved, in which it was held competent for a feoffor, grantor or devisor of a vested estate in fee-simple, whether in remainder or possession, by any condition or restriction in the instrument creating it, to suspend all power of the feoffee, grantee or devisee, otherwise competent to sell, for a single day, I have not been able to find it, and the able counsel for the defendants, whose research nothing of this kind is likely to escape, seem to have been equally unsuccessful." And further: "We are entirely satisfied there has never been a time since the statute *quia emptores*, when a restriction in a conveyance of a vested estate, in fee-simple, in possession, or remainder, against selling for a particular period of time, was valid by the common law; and we think it would be unwise and injurious to admit into the law the principle contended for by the defendant's counsel, that such restrictions should be held valid if imposed only for a reasonable time." "It is safe to say that every estate depending upon such a question would, by the very fact of such a question existing, lose a large share of its market value. Who can say whether the time is reasonable until the question has been settled in the court of last resort? And upon what standard of certainty can the court decide it? Or depending, as it must, upon all the peculiar facts and circumstances of each particular case, is the question to be submitted to a jury? The only safe rule of decision is to hold, as I understand the common law for ages to have been, that a condition or restriction which would suspend all power of alienation for a single day, is inconsistent with the estate granted, unreasonable and void."

For another case, containing a most exhaustive consideration of this question, see *DePeyster* v. *Michael*, 6 N. Y. 467. In this case, after a very full review of the authorities, upon page 497, it is said: "Upon the highest legal authority, therefore, it may be

affirmed that in a fee-simple grant of land a condition that the grantee shall not alien, or that he shall pay a sum of money to the grantor upon alienation, is void, upon the ground that it is repugnant to the estate granted."

In *Bradley* v. *Peixoto*, 3 Ves. Jr. 324, it is said: "I have looked into the cases that have been mentioned, and find it laid down as a rule, long ago established, that where there is a gift with a condition inconsistent with and repugnant to such gift, the condition is wholly void. A condition that the tenant in fee shall not alien is repugnant." See, also, *Brandon* v. *Robinson*, 18 Ves. Jr. 429; *McCullough* v. *Gilmore*, 11 Penn. St. 370.

In *Vincent* v. *Watson*, 19 Penn. St. 96, a testator devised to his daughter and to her legal heirs for ever certain real estate, with the express condition that she should "not alien or dispose of the same, or join with her husband in any deed for the conveyance thereof during her natural life." The court held the condition void, and that a fee-simple estate was devised, and say: "It makes no difference that the testator has expressly withheld one of the rights essential to a fee-simple; for the law does not allow an estate to be granted to a man and his heirs with a restraint on alienation, and frustrates the most clear intention to impose such a restraint; just as it allowed alienation of an estate tail, though a contrary intent is manifest. And it would be exceedingly improper, in any court, in construing a devise to a man and his heirs, to give effect to the restraint upon the alienation by changing the character of the estate to a life-estate, with a remainder annexed to it, or with an executory devise over." In *Hall* v. *Tufts*, 18 Pick. 455, testator devised certain real estate "to his wife for her life, and the remainder of the estate, whether real or personal, in possession or reversion, to his five children, to be equally divided among them or their heirs, respectively; always intending and meaning that none of his children shall dispose of their part of the real estate in reversion before it is legally assigned to them." It was held that the children took a vested remainder in the real estate given to the wife for her life, and that the clause restraining them from aliening the same before the expiration of the life-estate was void.

The case of *Blackstone Bank* v. *Davis*, 21 Pick. 42, is exactly in point. In that case one Davis devised to his son the use of a farm of one hundred and twenty acres, with a provision that the

land should not be subject or liable to conveyance or attachment. The plaintiffs recovered a judgment against the devisee, and levied an execution upon the premises as upon land held by the defendant in fee. The court say: "By the devise of the profits, use or occupation of the land, the land itself is devised. Whether the defendant took an estate in fee or for life only is a question not material in the present case. The sole question is whether the estate in his hands was liable to attachment, and to be taken in execution as his property. The plaintiffs claim title under the levy of an execution against the defendant, and their title is valid if the estate was liable to be so taken. That it was so liable, notwithstanding the proviso or condition in the will, the court cannot entertain a doubt."

The appellant cites and relies solely upon *Nichols* v. *Eaton*, 91 U. S. 716. In that case the testator devised her real estate to trustees upon trusts to pay the rents, profits and interest to her four children, with a proviso that if any of her sons should alienate or dispose of the income, or if by means of bankruptcy or insolvency, or any other means, said income could not be personally enjoyed by them respectively, but would become vested in or payable to some other person, then the trust in said will concerning so much thereof as would so vest, should immediately cease and determine. The case differs from the present one in two essential and controlling particulars. *First*, the estate was devised to trustees, and never vested in the beneficiaries; *second*, the enjoyment of the benefits of the devise was made to depend upon a condition.

We have no hesitancy in holding, in view of the authorities above quoted, and others that might be referred to, that the conditions in this deed against alienage and liability for debts are void.

It is insisted, however, that whatever view may be taken of the foregoing question, still the demurrer should have been overruled, because the petition alleges that a part of the land was the homestead of the plaintiff and his family, and the execution and return, notice of sale, and sheriff's certificate, all show that no part of the land was set apart to plaintiff as a homestead, as by statute required, but that the whole one hundred and thirty acres were sold in a lump and bought by the defendant. It is insisted this renders the sale absolutely void under *Linscott* v. *Lamart*, 46 Iowa 312, and *White* v. *Rouly*, Id. 680. The petition, we think, does not base the plaintiff's right to relief upon the ground that a portion of the

premises was his homestead, and not set apart to him as prescribed in the statute. The petition does not allege that a portion of the land is plaintiff's homestead, but incidentally it is alleged that he has gone into possession of the whole real estate, and occupied the same, which embraced one hundred and thirty acres as his homestead.

It is not alleged when he took possession, nor does it appear when the debt was contracted. For aught that the petition shows, the homestead was liable for this debt. No complaint was made in the petition that it was not set-off to the plaintiff, nor that the other property was not first exhausted. The ground upon which relief is asked, is that the plaintiff owned no interest in the land subject to execution. The demurrer was properly sustained.

Inasmuch as the defendant offered to release from the operation of the sheriff's sale the homestead of the plaintiffs, they may, if they are so advised, have a decree granting them that relief.

The doctrine of the particular case opens one of the most interesting chapters in the history of the law of real property; for it announces the rule to be, that a condition annexed to a conveyance of the fee, or to a devise of the same, which seeks to prohibit the grantee or devisee from alienating the property, is unlawful and void, whereas the old rule was, that a grantee, even without an express restriction in the grant, did not possess the power of alienation.

Notwithstanding the fact that writers upon natural law have always maintained that the power of alienation was one founded on natural right (Grotius, de Jure Belli et Pacis, lib. 2, c. 6, n. 1), it nevertheless was a power which was not allowed to be exercised under the feudal law of England, for reasons which it may not be uninteresting to recall. The feudal system was based upon the military policy which led the conquering general to allot to the superior officers or lords large districts or parcels of the newly-acquired territory. These allotments were called feuds, and were held upon condition that the possessor should faithfully defend him by whom they were given. The lords then granted smaller districts to their inferiors or vassals, who held the land upon the similar condition of doing faithful service to their grantors. But these grantees could not alienate the feud without the consent of the lord of the feud, "lest thereby a feeble or suspicious tenant might have been substituted and imposed upon him to perform the feudal services, instead of one on whose abilities and fidelity he could depend:" 2 Bl. Com. 287. Upon the death of the grantee, the law originally was that the heir of the grantee could not inherit, but the land at once reverted to the grantor: 2 Bl. Com. 56. But afterwards, when the heirs of the grantee were permitted to inherit the feud, the law was that if the blood of the grantee became extinct, the feud reverted back to the lord of the fee by whom it was granted: 2 Bl. Com. 245. So that there always remained in the grantor *a possibility of a reverter*. This possibility of reverter was such an interest in the land as entitled the grantor to restrict the right of alienation, for if the grantee was left at liberty to aliene the premises, it was possible for him, by so doing, to defeat or

cut off the reversion. We, therefore, find the rule early laid down as follows: "A man, before the statute of *quia emptores*, might have made feoffment in fee, and added further, that if he or his heirs did alien without license, that he should pay a fine, then this had been good; and so it is said that then the lord might have restrained the alienation of his tenant by condition, *because the lord had a possibility of reverter*:" Co. Litt. 223 a, b. And in *Mandlebaum* v. *McDonell*, 29 Mich. 78, 94, 95, we find the court declaring that "at common law, prior to the statute *quia emptores*, a condition against alienation would, in England, have been good *because prior to that statute the feoffor or grantor of such an estate was entitled to the escheat*, on failure of heirs of grantee, which was properly a possibility of reverter, and was treated as a reversion; so that the vendor did not, by the feoffment or conveyance, part with the entire estate; but this reversion, dependent on this contingency, remained in him and his heirs, which gave them an interest to insist upon the condition and take the benefit accruing to them upon the breach."

But the statute *quia emptores* changed all this by cutting off the possibility of a reverter. The statute *quia emptores*, A. D. 1290, or statute of Westminster, 18 Edw. I., ch. 1, is entitled in the Parliament roll, from the subject of it, *statutum regis de terris vendendis et emendis*. This statute provides, "that from henceforth it shall be lawful for any freeman to sell at his own pleasure, his lands and tenements, or part of them, so that the feoffee shall hold the same lands and tenements of the chief lord of the same fee by such service and customs as the feoffor held before." This statute established the free right of alienation by the sub-vassal without the lord's consent, and by declaring that the grantee should not hold the land of his immediate feoffor, but of the chief lord of the fee, of whom the grantor himself held, it in effect cut off the possibility of reverter, which the immediate feoffor had hitherto enjoyed, but which now passed from him to the chief lord of the fee. From that time on, the grantor of the entire estate or fee had no possible interest in the fee conveyed, and therefore he was no longer permitted to prohibit the right of alienation, for as it has been declared in *De Peyster* v. *Michael*, 6 N. Y. 467, 499, this possibility of reverter "was the *sole* foundation on which rested the right of a grantor in fee to restrain the alienation." This "sole foundation," then, being removed by this statute, the right which was based on this foundation consequently fell when it was removed. The learned editor of Smith's Leading Cases, however, combats the idea that the reason why the grantor is no longer entitled to impose such a restraint upon his grantee, is simply because he no longer has a reversionary interest in the estate granted. This view of the subject strikes him as too narrow. "If the want of a reversionary interest in the grantor," he says, "and the consequent absence of tenure between him and the grantee, were the only reasons why a condition in restraint of alienation cannot be attached to an estate in fee, there would be no obstacle to the annexation of such a proviso to a gift in tail, which is well known to leave a reversion in the donor; and yet nothing is better settled than that a provision restraining or fettering the alienation of an estate-tail, is essentially void, and a limitation over in the event of its breach wholly inoperative: *King* v. *Burchell*, Ambler 379. The true reason why such conditions cannot be attached to estates of inheritance, seems to be that the restrictions which they impose are necessarily more injurious on one side than beneficial on the other, and are inconsistent with the full property and dominion which the owners of the soil ought to possess, not only for their own benefit, but for that of the community." See note to *Dum-*

por's Case, 1 Sm. Ld. Cas. 101. But the reason which is usually assigned for this change in the law, is that stated in the New York case cited above. The Michigan case of *Mandlebaum* v. *McDonell*, cited *supra*, and which, with the New York case, are perhaps the two most satisfactory cases upon this subject, which have been decided in this country, is governed by the same theory that prevailed in the case from New York.

It may be, however, safely affirmed that it is now settled beyond hope of controversy that since the statute *quia emptores*, any condition in a conveyance or devise of land in fee-simple, which prohibits all alienation of the land by the grantee, is absolutely void and of no effect: Co. Litt. 223 a; 1 Preston on Estates 477; *Bradley* v. *Peixoto*, 3 Ves. Jr. 324; *Brandon* v. *Robinson*, 18 Id. 429; *Newton* v. *Reid*, 4 Sim. 141; *Dick* v. *Pitchford*, 1 Dev. & Bat. Eq. 480; *Schermerhorn* v. *Negus*, 1 Denio 448; *De Peyster* v. *Michael*, 6 New York 467; *Gleason* v. *Fayerweather*, 4 Gray 348; *Hall* v. *Tufts*, 18 Pick. 455; *Blackstone Bank* v. *Davis*, 21 Id. 42; *Reifsnyder* v. *Hunter*, 19 Penn. St. 41; *Walker* v. *Vincent*, Id. 369; *Brothers* v. *McCurdy*, 36 Id. 407. See also *Oxley* v. *Lane*, 35 N. Y. 340, 346; *Van Rensselaer* v. *Dennison*, Id. 393.

But while an entire prohibition of the right to alienate the estate is thus held to be void, yet it seems that the grantor can lawfully prohibit his grantee from alienating to a *particular* person. See 1 Preston on Estates 478; Litt., sect. 361; Co. Litt. 223. Littleton says: "If the condition be such that the feoffee shall not alien to such a one, naming his name, or to any of his heirs, or of the issues of such a one or the like, which conditions do not take away all power of alienation from the feoffee, &c., then such condition is good." In *Doe* v. *Pearson*, 6 East 173, a condition against alienation, except to the sisters of the devisees or their children, annexed to a devise in fee, was held to be valid, and that the heirs of the devisor might recover on its breach. But where a testator, after devising land in equal shares to several children for life, with remainder in fee to their children, declared that no portion of the real estate devised should be sold or alienated by the devisees or their descendants, except to each other or to their descendants, the prohibition against alienation was held in New York to be void: *Schermerhorn* v. *Negus*, 1 Denio 448.

We usually find it laid down that where the prohibition against alienation is for a *limited time* only, the limitation is good, provided only it is for a *reasonable* time. See Shep. Touch. 129, note (Am. ed. of 1808); Preston on Estates 478; Bac. Abr., *Condition*, L, note; *Stewart* v. *Brady*, 3 Bush (Ky.) 623; *Stewart* v. *Barrow*, 7 Id. 368. The following have also been supposed to favor that doctrine: *Larges's Case*, 2 Leonard 82; s. c. 3 Id. 182; *Dougal* v. *Fryer*, 3 Mo. 40; *McWilliams* v. *Nisly*, 2 S. & R. 507; *Jackson* v. *Schutz*, 18 Johns. 174, 184; *Gray* v. *Blanchard*, 8 Pick. 284; *Blackstone Bank* v. *Davis*, 21 Id. 42; *Simonds* v. *Simonds*, 3 Metc. 562; *Langdon* v. *Ingram's Guardian*, 28 Ind. 360. And Mr. Washburn asserts the same principle: 1 Wash. on Real Prop. 69. And it is safe to say that this has been generally supposed to be the true doctrine. It is in view of this impression being so general, as well as from the importance of the question itself, that the case of *Mandlebaum* v. *McDonell*, 29 Mich. 78, cited in the particular case, is worthy of most attentive consideration; for the question directly arose in that case, and it was expressly ruled that a prohibition of alienation, even for a limited period, was void.

The authorities were all considered, and in the opinion of the court, the contrary theory was based upon a misconception of *Large's Case*, *supra*. The opinion is able and exhaustive, and com-

ing as it does from a court whose ability is everywhere conceded, it will not be surprising if it finally comes to be regarded as a correct exposition of the law upon this subject, notwithstanding that the contrary view was so generally regarded as right. The contrary impression of the law was all but universal. Even in a recent case in the Supreme Court of the United States, we find Mr. Justice FIELD asserting that "conditions which prohibit its alienation to particular persons *or for a limited period*, or its subjection to particular uses, are not subversive of the estate; they do not destroy or limit its alienable or inheritable character:" *Cowell* v. *Springs Co.*, 100 U. S. 55. What was here said as to a prohibition of alienation for a limited period, was, however, a mere *obiter dictum*, as the real question before the court was simply whether a restriction to particular uses was valid. The prohibition in this case was against using the property for the sale of intoxicating liquors, and it was sustained as valid. The Supreme Court of Connecticut had held in an earlier case that a condition in a deed that no ardent spirits should be kept or sold on any part of the premises, was valid: *Collins* v. *Marcy*, 25 Conn. 242. There are many other cases to the same effect.

Not only is a condition restraining the grantee from alienating the premises void, but it is also held that a condition which requires the grantee or devisee to pay to the grantor or devisor a sum of money upon alienation, is invalid. See *King* v. *Burchell*, Amb. 379; *Livingston* v. *Stickles*, 7 Hill 257; *De Peyster* v. *Michal*, 6 N. Y. 467, 494. In this last cited case the court say that "If the continuance of the estate can be made to depend on the payment of a tenth, or a sixth, or a fourth part of the value of the land at every sale, it may be made to depend on the payment of nine-tenths or the whole of the sale money. It is impossible on any known principle to say, that a condition to pay a quarter of the sale money is valid, and a condition to pay the half or any quarter proportion would be void. If we affirm the validity of a condition to pay a quarter, we must affirm a condition to pay any quarter amount. It would be a bold assertion to say that the adoption of such a principle would not operate as a fatal restraint upon alienation. That which cannot be done by a direct prohibition cannot be done indirectly. The enforcement of the restraint upon alienation by requiring money to be paid for the privilege, and by a forfeiture in case of non-payment, separates the incident of free alienation from the estate in fee as effectually as a direct prohibition."

It is held, however, that an annual rent may be reserved upon conveyance in fee, with a right of re-entry for non-payment; and in Pennsylvania, such rents, under the name of ground-rents, are very numerous and have given rise to one of the most learned and important branches of the law of real property. See *Ingersoll* v. *Sergeant*, 1 Whart. 337; *Franciscus* v. *Reigart*, 4 Watts 98; *Irwin* v. *Bank of U. S.*, 1 Barr 349, and *Robb* v. *Beaver*, 8 W. & S. 126. Ground-rents also exist in New York: *Van Rensselaer* v. *Ball*, 19 N. Y. 100. And it is immaterial that there is no reversion in the person entitled to the rent: *Van Rensselaer* v. *Hays*, 19 N. Y. 68. Such rents are real estate: *Cobb* v. *Biddle*, 2 Harris 444; and pass under a devise of all the testator's tenements and hereditaments: *Van Rensselaer* v. *Read*, 26 N. Y. 558.

Before leaving this subject, it is worthy of remark that in the case of a grant by the sovereign, it is lawful for him to impose upon the grantee a prohibition of his right to alienate the estate. The reason being "beeause he may reserve a tenure to himself:" Co. Litt. 223, a, b. This discredits, too, the opinion expressed by the editor of Smith's Lead. Cas., and which we adverted to above.

In so far as the question involved in the principal case related to the power of the grantor to impose a prohibition of the right of alienation, it seems that there was no difficulty in the case. The grantor had conveyed a fee-simple estate, retaining no interest therein for himself. There was no possibility of a reverter even. There is no authority therefore for holding that such a restriction upon the right of voluntary alienation could be sustained. Nevertheless, the court has devoted the major part of its opinion to the consideration of this question, passing by in a few words what really seems to have been the important feature of the case. That was whether the provision that the land could not be sold for the debts of the grantee, was valid. In other words is a provision against the *involuntary* alienation of the land for the debts of the grantor, to be sustained as distinguished from a provision against the *voluntary* alienation of the land. It must be confessed, we think, that the court does not deal with this branch of the case as fully as was desirable, especially as it involved the very pith and marrow of the question raised.

In *Brandon* v. *Robinson*, 18 Ves. 429, Lord ELDON held in a case where a a trust had been created to pay the dividends from time to time into the hands of the *cestui que trust*, with a proviso that the dividends should not be "grantable, transferable, or otherwise assignable," that notwithstanding the proviso, the dividends passed upon the bankruptcy of the *cestui que trust* to his assignee. The weight of authority in this country, is, however, evidently in favor of the proposition that an estate may be limited in trust for a debtor, so that it shall be free from involuntary alienation at the suit of his creditors, whether the instrument do or do not contain a limitation over upon such event: *Fisher* v. *Taylor*, 2 Rawle 33; *Ashhurst* v. *Given*, 5 W. & S. 323; *Vaux* v. *Parke*, 7 Id. 19; *Norris* v. *Johnston*, 5 Barr 289; *Eyrick* v. *Hetrick*, 1 Harris 491; *Barnett's Appeal*, 10 Wright 399, 402; *Leavitt* v. *Beirne*, 21 Conn. 8; *Markham* v. *Guerrant*, 4 Leigh 279; *Johnston* v. *Zane's Trustees*, 11 Gratt. 552; *Pope* v. *Elliott*, 8 B. Monr. 56; *Frazier* v. *Barnum*, 4 C. E. Green 316; *Hill* v. *McRae*, 27 Ala. 175. See Wms. Law Real Prop. (Am. ed. of 1872) p. 91, where the cases are all collected.

The opinion pronounced in the particular case, says "The appellant cites and relies solely upon *Nichols* v. *Eaton*, 91 U. S. 716," and seeks to dispose of that case by saying, that in it the testator had devised the estate to trustees, whereas in the case under consideration the grant was direct. But we are much mistaken if the distinction which the Iowa court draws between the two cases, disposes of the question which the appellants had raised. For the reasoning of the Supreme Court of the United States in that case, seems, so far as we are able to judge, as applicable to a direct grant with a restriction against involuntary alienation as it is to one made to a trustee. The language of the Supreme Court of the United States in that case was as follows: "We do not wish to have it understood that we accept the limitations which that (English Chancery) court has placed upon the power of testamentary disposition of property by its owner. We do not see, as implied in the remark of Lord ELDON, that the power of alienation is a necessary incident to a life-estate in real property, or that the rents and profits of real property, and the interest and dividends of personal property may not be enjoyed by an individual without liability for his debts being attached as a necessary incident to such enjoyment. This doctrine is one which the English Chancery Court has engrafted upon the common law for the benefit of creditors, and is comparatively of modern origin. * * * The doctrine, that the owner of property, in the free exercise of his will in disposing of it,

cannot so dispose of it, but that the object of his bounty, who parts with nothing in return, must hold it subject to the debts due his creditors, though that may soon deprive him of all the benefits sought to be conferred by the testator's affection or generosity, is one which we are not prepared to announce as the doctrine of this court." The court then denies that creditors have any right to complain because they are denied access to property devised or granted under such conditions. The grant or devise is matter of record, and creditors cannot be deceived or misled, as the conditions under which the property is held, being matter of record, inform them that they must not trust to the property so held. What right then have creditors to complain? If they have no right to complain, who is there to complain? If no one can complain, and if it is not, as the Supreme Court of the United States affirms, a necessary incident of property that it should be subject to involuntary alienation, what reason is there which makes it necessary that the property should be granted in trust in order to protect it from involuntary alienation? Upon principle we cannot see why any distinction should be made between the two cases.

HENRY WADE ROGERS.

Supreme Judicial Court of Massachusetts.

UNION INSTITUTION FOR SAVINGS *v.* CITY OF BOSTON ET AL.

On a debt which by express contract is payable at a specified future time, and until then is to bear a certain rate of interest, the same rate is to be allowed after maturity and until payment of the principal, whether it be called an incident or part of the debt, or damages for non-payment.

The cases on this subject carefully examined.

THIS was a bill in equity by a mortgagee of land taken by the city for the public use, to enforce a lien upon the money due from the city for damages for such taking, By the terms of the mortgages, the amounts of the mortgage debts were to be paid in five years, which had elapsed some time before the filing of the bill, "with interest semi-annually, at the rate of seven and a half per centum per annum;" and the question raised was, at what rate the interest should be computed for the time since the principal sums became due.

By the stat. of 1867, c. 56, sect. 1, the legal rate of interest in Massachusetts is six per cent. a year, when there is no agreement for a different rate; and by sect. 2, it is lawful to contract for any rate of interest, "provided, however, that no greater rate of interest than six per centum per annum shall be recovered in any action, except when the agreement to pay such greater rate of interest is in writing."